FILED
UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
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Stephan Harris
Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WADE JENSEN, and DONALD D. GOFF, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

SOLVAY CHEMICALS, INC., SOLVAY AMERICA, INC. and SOLVAY AMERICA COMPANIES PENSION PLAN,

Defendants.

Case No. 06-CV-273-J

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM V

This matter came before the Court on Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment on Claim V. The Court, having read the filings, and being fully advised in the premises, **FINDS** and **ORDERS** as follows:

BACKGROUND

Solvay America is a holding company that wholly owns Solvay Chemicals. Named

Plaintiff Wade E. Jensen ("Jensen") is currently employed with Solvay Chemicals in Green River, Wyoming. Jensen began his employment with Solvay Chemicals in September, 1991. Named Plaintiff Donald Goff was employed with Solvay Chemicals in Green River, Wyoming from February 1982 until September 15, 2005.

Plaintiffs filed this suit in response to the conversion ("the Conversion") of the Solvay America Companies Pension Plan ("Pension Plan") from a final average pay ("FAP") formula to a cash balance ("CB") formula. Before and after the Conversion, Solvay America funded 100% of the Pension Plan. No employee contributions were ever permitted or required. Plan assets are held in a trust. Solvay America bears the risk of any shortfall resulting from fluctuation in the Pension Plan's investments or actuarial gains or losses.

Until December 31, 2004, the Pension Plan was a traditional defined benefit pension plan utilizing a FAP formula. Under the terms of the FAP formula, participants were eligible to earn a single life annuity commencing at age 65, which was equal to 1.1% of the employee's highest average compensation (calculated from the highest salary earned over 60 consecutive months during the previous 120-month period) plus 0.6% of the employee's highest average compensation in excess of Social Security covered compensation times the employee's years of service, up to a maximum of 35 years.

Effective January 1, 2005, most existing Pension Plan participants were converted from the FAP formula to a CB formula. Participants who were at least 50 years of age and had at least 10 years of credited service were afforded a one-time option to either opt into the new CB formula or to remain under the terms of the FAB formula ("grandfather" eligible). All new participants after the Conversion entered the Pension Plan under the CB formula.

The reason for the Conversion is described by Defendants as follows. In the late 1990s and in early 2000, a number a market activities exposed concerns with Solvay America's various benefit plans. Pension contributions fluctuated widely from $8 million in 1996 down to zero in 2000 and back up again later. Then, financial markets and interest rates were declining, which increased the funding costs of the Pension Plan. From 2001 to 2003, a combination of poor investment returns and low interest rates caused annual Pension Plan contributions to skyrocket from about $6.5 million to about $24.8 million. Beginning in early 2003, a review was conducted in an effort to reduce the Pension Plan's significant funding volatility caused by unforeseen market changes. Later that year, the Towers Perrin ("Towers") actuarial firm was engaged to analyze the retirement benefits provided in comparison to the benefits provided by other companies in the industry sector. Towers presented various alternatives, including the options of converting the Pension Plan to a CB formula and enhancing features of a separate savings plan ("Savings Plan"), which is a defined contribution 401(k) plan, as a means of addressing market volatility.

The law firm of Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") was also retained to provide legal advice regarding converting the Pension Plan to a CB formula. In November 2003, Pillsbury advised that it "believe[d] that cash balance designs satisfy the current rules for tax-qualified plans and do not inherently violate age discrimination laws." Pillsbury updated its advice in 2004. Certain employees of Solvay Management Services, Inc. worked on the Conversion (these employees are referenced collectively as the "Conversion Team"). Members of the Conversion Team relied on Towers' and Pillsbury's advice in making decisions regarding the change of the Pension Plan, in formulating the plan to implement the Conversion to a CB formula, in drafting the documents effectuating the Conversion, and in drafting the communications materials related to the Conversion, including a notice describing the Pension Plan changes and their effects on participants' accounts ("204(h) Notice" or "the Notice") and the Notice documents that provided a summary of the material modifications to the Pension Plan ("SMM").

The Conversion had several effects on the Pension Plan and the Savings Plan. The Pension Plan's FAP formula was changed to a CB formula, under which existing participants received an opening account balance to which interest and pay credits were contributed on a quarterly basis. The opening account balance was calculated based on the benefit that the individual had accrued as of December 31, 2004 under the FAP formula. The opening account balance equaled the actuarial present value of this accrued benefit calculated with a 5% discount rate and adjusted for mortality based on the Internal Revenue Service's GAR 94 table. The CB formula's quarterly pay credits increased as a participant's age and years of service increased. Interest credits under the CB formula varied yearly based on 30-year treasury bond yields.

Under the terms of the CB formula, participants would always be entitled to receive a benefit amount not less than that calculated under the FAP formula as of December 31, 2004. Participants' accounts under the CB formula were also portable. Unlike the FAP formula, if a participant chose to leave employment before age 55, the participant could take a distribution from the CB account. The CB formula also provided participants with additional survivorship benefits. Unlike the FAP formula, participants under the CB formula could designate a beneficiary other than a spouse to receive the benefits on the participant's death. The beneficiary could also receive 100% of the benefits that the participant would have received.

Because the Pension Plan changes would take effect January 1, 2005, written information regarding the changes to the Pension and Savings Plans was mailed to participants on September 17, 2004, more than 45 days before the Pension Plan changes took effect. These materials included: (1) 204(h) Notice; (2) Future Choice Brochure; and (3)

Personalized Statement of Estimated Opening Account balances. The Defendants assert that the 204(h) Notice, along with the Future Choice Brochure, also acted as an SMM.

The 204(h) Notice provided a description of the former FAP formula, including a description of the early retirement subsidy. It provided, in pertinent part, as follows:

> Under the current plan, you earn a life annuity commencing at age 65 equal to a percentage of average earnings prior to retirement for each year of service (1.1% of average earning plus 0.6% of average earnings in excess of Social Security covered compensation). Generally, this benefit cannot be taken as a lump sum. The current plan also allows you to retire as early as age 55 and receive a life annuity commencing on your early retirement date but reduced to reflect the earlier retirement. The current plan formula includes an early retirement subsidy.

The 204(h) Notice provided a chart showing examples of how the early retirement subsidy is calculated, under the heading "Early Retirement Benefits." The 204(h) Notice provided that, "[e]arly retirement factors are not considered in this calculation," and "the starting account balance does not include the value of the early retirement subsidy." It also described the relationship between the two formulas, provided that participants will never receive a lower benefit than the amount earned under the FAP formula as of December 31, 2004, and noted that the CB formula will not include early retirement subsidies, stating that, "[t]he benefit you earn after December 31, 2004 under the new [CB] formula will not include early retirement subsidies." The 204(h) Notice also described the CB formula, its structure of crediting benefits, and the calculation of participants' opening account balances.

The 204(h) Notice also informed participants of the potential for "wear away" in layman's terms. Specifically, the 204(h) Notice provided a narrative explaining that some participants' "monthly benefit may not increase at the same rate or at all in some years" and that this may be due to "changes in prevailing interest rates" or because "the staring account balance . . . does not take into account early retirement subsidies." The 204(h) Notice provided an illustrated chart that displayed the phenomenon of wear away through a hypothetical employee. After the illustrative chart, the 204(h) Notice provided:

> In this example, while the lump sum in the new plan continues to increase with pay and interest credits at each age, the actuarial equivalent monthly annuity will be no greater than the monthly annuity earned as of December 31, 2004 until this employee reaches age 61, when she will begin to earn an additional annuity benefit under the new plan formula.

The 204(h) Notice provided two additional tables that were explained to be "designed to help [participants] understand how the plan changes may affect your future benefits." The tables provided sixteen examples for participants of wide-ranging ages and years of service that listed benefits they would receive at ages 55 and 65 under the FAP and CB formulas and included a description of the underlying assumptions. The 204(h) Notice explained, "[a]lthough they are not personalized, the examples will help you understand the potential impact of the formula changes on your plan benefits."

Like the 204(h) Notice, the Future Choice Brochure was distributed to all participants.

In combination with the 204(h) Notice, it served as an SMM. It discussed the new terms of the Pension and Savings Plan and included examples of how the new terms credit participants with benefits. It also described the CB formula, its structure of crediting benefits, and the calculation of participants' opening account balances. The brochure included a section with frequently asked questions and a section that informed participants of the upcoming on-site meetings and the rollout of the on-line benefits and investment tools. The Future Choice Brochure stated that individuals that are "age 50 or over, with at least 10 years of credited plan service as of January 1, 2005" would have "a one-time option to remain in the current pension plan and 401(k) Savings Plan or move into" the CB Plan. For individuals with a choice, "a Decision Guide that includes more information" about their options was included in the back pocket of the Future Choice Brochure.

Each person automatically transferring into the CB Plan also received a Personalized Statement of Estimated Opening Account Balance. This statement provided participants with an estimate of their opening balance under the CB formula and a description of how it was calculated, including a description of underlying assumptions.

The Pension Plan and Savings Plan changes were also presented to participants in live, on-site meetings in September and October 2004, using a standardized PowerPoint presentation. In the meetings, the material terms of both the former FAP formula and the CB formula were presented. The presentations of those who spoke at the on-site meetings were consistent with the PowerPoint slides shown to participants.

On January 1, 2005, the changes to the Pension Plan and Savings Plan became effective. Of the 468 participants who were 50 years of age or older with at least 10 years of service who were given the option to choose between plans, 118 chose to switch to the CB formula. All other existing eligible employees, and those hired after January 1, 2005, began participating in the new CB formula.

On March 16, 2005, Goff (age 49 at that time) submitted an intake questionnaire to the Wyoming Labor Standards Department of Employment ("Labor Standards") alleging that the Conversion violated the ADEA because he "lost 2/3 of [his] pension" while employees who were over the age of 50 were allowed to stay under the FAP formula. Likewise, Jensen (age 43 at that time) submitted an intake questionnaire alleging that he "was not old enough to keep [his] old plan." On March 28, 2005, Labor Standards informed both Goff and Jensen individually that each charge "does not establish the basis for a claim of discrimination" because ADEA "does not prohibit an employer from favoring an older employee over a younger one."

On July 21, 2005, Goff and Jensen filed new charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"), "on . . . behalf of all other present and former employees of Solvay America, Inc., and its subsidiary, Solvay Chemicals, Inc., who were ages 40 through 49 on January 1, 2005." Without waiting for EEOC's determination, Goff and Jensen filed this suit, as a result, the EEOC closed the charges.

On March 6, 2006, Plaintiffs' counsel submitted a letter to Solvay America that "concern[ed] the retirement benefits that Jensen and others are due under [ERISA]" and listed allegations regarding the claims presently before the Court. In the letter, Jensen's counsel asserted claims similar to those alleged in the Complaint.

Solvay America referred the letter to the Pension Plan Administrative Committee ("PPAC"), which contacted Pillsbury to obtain a legal analysis of Jensen's claims. On April 10, 2006, the PPAC sent a letter to Plaintiffs' counsel stating that it was treating the March 7, 2006 letter as claims for benefits under the Pension Plan. Pillsbury provided the PPAC with a memorandum providing legal analysis of the issues raised by Jensen's letter. After its detailed analysis of each of Jensen's claims, Pillsbury concluded in its memorandum that "the arguments in Jensen's Administrative Claim letter do not provide a sound legal basis for relief." Towers also provided advice regarding these issues.

On August 31, 2006, the PPAC sent Plaintiffs' counsel a letter denying Mr. Jensen's claim. This letter was based on the advice of Pillsbury and Towers concerning the legality of the conversion to a CB formula. Plaintiffs never appealed the initial adverse claim determination.

Plaintiffs bring suit against Defendants alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Age Discrimination in Employment Act of 1964 ("ADEA"), 29 U.S.C. §§ 621-634, resulting from the Conversion. Essentially, Plaintiffs assert that such plan conversions are inherently age discriminatory and that they did not receive adequate information about the effects of the Conversion.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. Fed. R. Civ. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Thus, a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nelson v. Geringer*, 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most favorable to the party opposing summary judgment. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). The movant bears the initial burden of demonstrating the absence of evidence to support the non-moving party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). When the non-moving party bears the burden of proof at trial, the burden then shifts to it to demonstrate the existence of an essential element of its case. *Id.* To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT ON CLAIM V

In their Motion for Summary Judgment, Defendants ask the Court to dismiss with prejudice Plaintiffs' class and collective action claims in Plaintiffs' Complaint numbered One through Six, which are brought under ERISA and the ADEA. Defendants assert that (1) The Conversion does not unlawfully discriminate based on age; (2) Plaintiffs' ADEA § 4(a) claim fails as a matter of law; (3) Plaintiffs' anti-backloading claim is unsustainable; (4) Plaintiffs' forfeiture claim also fails; (5) Plaintiffs' 204(h) Notice claim fails as a matter of law; (6)

Plaintiffs' Sixth Claim for Relief similarly fails; and (7) Plaintiffs are not entitled to liquidated damages.

Plaintiffs agree with the Defendants' general contention that an employer is "free" to decide whether to offer employee benefits. Plaintiffs that once on employer offers a benefit, it is held to the rules that it has adopted and disclosed to employees and to certain minimum standards established by ERISA to protect the anticipated retirement benefits and improve the equitable character of such plans. Plaintiffs ask the Court to deny Defendants' request for summary judgment because they assert material issues of fact remain for the finder of fact in this case.

(1) Plaintiffs' Fourth Claim for Relief

Defendants' Arguments

Defendants dispute Plaintiffs' Fourth Claim for Relief, that the Conversion was inherently age discriminatory in violation of ERISA § 204(b)(1)(H) and its mirror provision, ADEA § (4)(i). They point out that every appeals court addressing this issue has rejected Plaintiffs' theory, holding that cash balance conversions similar to this one are not inherently age discriminatory and do not violate ERISA § 204(b)(1)(H) as a matter of law in advance of trial.

Defendants contend that under ERISA, a defined benefit plan is age discriminatory "if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i). Defendants take issue with Plaintiffs' allegation that the Conversion reduced the rate of participants' "benefit accrual" because of age, and thereby there is a violation of ERISA. (Compl. ¶¶ 57-62). Plaintiffs argue that "[t]he rate of benefit accrual in a defined benefit plan is determined by the increase in the 'accrued benefit.'" (Compl. ¶ 57). Defendants take issue with Plaintiffs' interpretation that the term "benefit accrual" has the same meaning as "accrued benefit." Defendants ask the Court to reject Plaintiffs' definition of "rate of benefit accrual" and conclude that it refers to the benefit "inputs" the Pension Plan credits to participants' accounts. In doing such, the Defendants assert will lead the Court to conclude that Plaintiffs cannot raise a fact issue that the CB formula is age discriminatory because under the CB formula because the Pension Plan allots the same interest credit to all participants regardless of age. Defendants further assert that under the CB plan, "pay credits" are allotted to participants that actually increase with age and years of service. Therefore, Defendants contend that the CB formula's "rate of benefit accrual" properly defined, is not only non-discriminatory, but actually favors older, longer-serviced employees.

Defendants next argue that ERISA § 204(b)(1)(H) does not prohibit the effects of the time value of money. They point out that because a younger person has more years until retirement, the younger employee will have more time to accrue pay credits and interest in his or her account; therefore, the concept of time value of money is not a form of discrimination.

Defendants argue that numerous courts have determined that other cash balance conversions comply with ERISA notwithstanding the presence of wear away, freezes in participants' benefits, and the use of a "greater of" final average pay or cash balance formula.

In further support of their argument, Defendants assert that Plaintiffs' mirror ADEA § 4(i) claim fails as a matter of law for the same reasons as their ERISA § 204(b)(1)(H)(i) claim. Defendants argue that the language in ADEA § 4(i) prohibiting "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age" is nearly and purposefully identical to language in ERISA § 204(b)(1)(h)(i). Defendants then make the same arguments as above regarding the rate of benefit accrual and that the CB formula favors older, longer-serviced employees. Therefore, Defendants contend that because Plaintiffs cannot recover under ERISA § 204(b)(1)(H)(i), Plaintiffs cannot recover under ADEA § 4(i).

Plaintiffs' Arguments

Plaintiffs contend that Solvay is not entitled to summary judgment on Plaintiffs' Fourth Claim for two reasons: (1) Plaintiffs' claim of age discrimination in the rate of benefit accrual is based on the particular facts and circumstances of Solvay's conversion and (2) Solvay's arguments on ADEA § 4(i) are misguided for the same reasons as are its arguments on ERISA § 204(b)(1)(H).

First, Plaintiffs argue that their claim of age discrimination in the rate of benefit accrual is based on the particular facts and circumstances of Solvay's conversion. Plaintiffs assert that Defendants mischaracterize their Complaint by stating that the "gravamen of Plaintiffs' Complaint lies in their allegation that the Conversion was inherently age discriminatory;" when in reality, Plaintiffs state that their Fourth Claim is based on the particular characteristics of Solvay's plan, not the inherent characteristics of all such plans. Plaintiffs contend that their experts have shown that under Solvay's transition design, older employees are offered much lower future monthly retirement benefits, in large part because of the designed-in periods of "wear away" in which they are not earning any additional monthly benefits at all.

Plaintiffs assert that they maintain that Congress has consistently used the term "benefit accrual" in ERISA to refer to the change in the accrued benefit. They point out that the Treasury Department has adopted this position in applying the anti-backloading rules in ERISA §§ 204(b)(1) & (h).

Plaintiffs cite two problems with Defendants' arguments that the differences are due solely to the "time value of money." First, Plaintiffs contend that recent events show the historical truth that money does not have a time value, not only can stocks and bonds lose money over time, but even savings accounts do not necessarily increase. Plaintiffs further contend that in this instance, the credits that Solvay's cash balance formula offers are merely bookkeeping notations that Solvay reserves the right to alter. Plaintiffs contend that such credits do not represent deposits to any employee's actual account and cannot be compared to the "time value of money."

Second, Plaintiffs argue that none of the appellate decisions upon which Defendants rely has decided that a plan designated to produce wear away periods for older employees is exempt from the prohibition against discrimination based on age, or is subject to a test that can be satisfied with fictitious cash balance "inputs." Plaintiffs contend that they have offered evidence that older participants have longer wear away periods under the plan through the submission of actuarial and statistical expert reports and will further offer such evidence at trial. As a result, Defendants assert there are genuine issues of material facts for trial regarding their Fourth Claim for Relief.

Analysis

The Court will begin by laying out the legal background surrounding the issues before it. "ERISA does not mandate that employers provide any particular benefits." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983). "[E]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" pension and welfare plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). "An employer is free to move from one legal plan to another legal plan, provided that it does not diminish vested interests." *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006).

Under ERISA, there are two types of pension plans, defined contribution plans and defined benefit plans. *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 61 (3d Cir. 2007). A defined contribution plan is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses." 29 U.S.C. § 1002(34). Although both "employees and employers may contribute to the plan . . the employer's contribution is fixed and the employees receives whatever level of benefits the amount contributed on his behalf will provide." *Hughes Aircraft Co. V. Jacobson*, 525 U.S. 432 (1999). "The employee bears the investment risks and the employer does not guarantee a retirement benefit to the employee." *Register*, 477 F.3d at 61-62.

In a defined benefit plan, participants "have no claim to any particular asset that composes a part of the plan's general asset pool, but, instead, receive an annuity based on the retiree's earnings history, usually the most recent or highest paid years, and the number of completed years of service to the company." *Id.* The employer bears the investment risk under a defined benefit plan. *Id.*

A cash balance plan is a defined benefit plan by statutory definition. *Drutis v. Rand McNally & Co.*, 499 F.3d 608, 612 (6th Cir. 2007). "Nevertheless, a cash balance plan differs from a traditional defined benefit plan in that traditional defined benefit plans define an employee's benefit as a series of monthly payments to begin at retirement, but cash balance plans define the benefit in terms of a stated account balance, albeit a "hypothetical" account. Thus cash balance plans are like defined contribution plans in that both define the employee's benefit in terms of a stated balance." *Register*, 477 F.3d at 62. For this reason, cash balance are described as "hybrid," "they create a benefit structure that simulates that of defined contribution plans, but employers do not deposit funds in actual investment accounts, and employers, not employees, bear the market risks." *Hirt v. Equitable Ret. Plan*, 533 F.3d 102, 105 (2d Cir. 2008). Further, employers credit individual participants' CB accounts with bookkeeping notations. *Register*, 477 F.3d at 62. CB accounts are, thus, known as "hypothetical" accounts, notwithstanding that the notation represents a promise to pay a real benefit.

The Court now turns to the Defendants' request for summary judgment on Plaintiffs' Fourth Claim for Relief. The Court agrees with Defendants in that the gravamen of Plaintiffs' Complaint lies in their allegation that the Conversion was inherently age discriminatory. For that reason, the Court analyzes Plaintiffs' Fourth Claim for Relief first. Plaintiffs' Fourth claim for relief fails for the following reasons.

Under ERISA, a defined benefit plan is age discriminatory "if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age. ERISA § 204(b)(1)(H)(i). Plaintiffs allege that the Conversion reduced the rate of participants' "benefit accrual" because of age, and thereby violates ERISA § 204(b)(1)(H). (Comp. ¶¶ 57-62). Plaintiffs predicate their argument on the notion that "[t]he rate of benefit accrual in a defined benefit plan is determined by the increase in the 'accrued benefit'." (Compl. ¶ 57). In essence, Plaintiffs assert that the term "benefit accrual" has the same meaning as "accrued benefit." This is further supported by the testimony of Plaintiffs' actuarial expert witness, Claude Poulin, who testified that "benefit accrual" is assessed by a consideration of the Pension Plan's "outputs" to participants, rather than the "inputs" credited to participants' hypothetical accounts. (Defs.' Ex. 28, Poulin Dep. Tr. 67:7-10; 68:10-19).

Although the Tenth Circuit has not addressed Plaintiffs' argument, it has been rejected as a matter of law by all five federal appellate courts that have addressed it. *Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024, 1029-32 (9th Cir. 2008); *Hirt*, 533 F.3d at 107; *Drutis*, 499 F.3d 614; *Register*, 477 F.3d at 68-69; *Cooper*, 457 F.3d at 639. This line of cases holds that cash balance plans, such as the one at the heart of the case before this Court, do not violate ERISA's age discrimination provision because they do not discriminate against older workers. The proper reading of ERISA §204(b)(1)(H)(i) is to look at the "inputs" that an employer makes to a cash balance plan, rather than the "outputs" employees will receive at retirement in determining whether the "benefit accrual" is age discriminatory under ERISA. Further, such a definition for "benefit accrual" does not carry the same meaning as "accrued benefit," which refers to the "outputs" after compounding. Specially, this Court finds that the CB plan at issue in this case does not violate ERISA's age discrimination provision because the rate of benefit accruals does not decline as an employee's age increases. Plaintiffs have put forth no evidence that the CB plan is discriminatory in such a way. In fact, the CB formula actually favors longer-service employees because it allots "pay credits" to participants that increase with age and years of service. This Court follows that majority of the circuits which have looked at this issue and finds that the CB plan at issue does not reduce the rate of an employee's benefit accrual because of age and, therefore, does not violate ERISA §

204(b)(1)(H)(i).

Plaintiffs also incorrectly treat the time value of money as age discrimination in alleging that "[f]uture interest credits under a cash balance pension plan are greater for younger participants *due to the effect of compounding hypothetical interest credits until retirement*. As a result, younger employees accrue more retirement benefits from a particular year's hypothetical pay credit than older employees." (Compl. ¶ 58). This allegation has been uniformly rejected as the basis for a claim under ERISA § 204(b)(1)(H). "Nothing in the language or background of § 204(b)(1)(H)(i) suggests that Congress set out to legislate against the fact that younger workers have (statistically) more time left before retirement, and thus a greater opportunity to earn interest on each year's retirement savings." *Cooper*, 457 F.3d 639. "Treating the time value of money as a form of discrimination is not sensible." *Id.* Additionally, "the 'rate of benefit accrual' refers to the employer's contribution to a plan, and therefore any difference in output as a result of time and compound interest does not violate § 204(b)(1)(H)(i)." *Drutis*, 499 F.3d at 614; *see also Hirt*, 533 F.3d at 108 (holding "[t]he fact that the ultimate benefit might grow to be larger for younger couples – who have more time until normal retirement age than their older counterparts – would not be relevant to the comparison of accrual rates"); *see also Register*, 477 F.3d at 70 (holding "[t]he circumstance that the same contribution in the form of interest credits may result in a more valuable annuity for a younger employee is not discrimination in whole or in part based on age; rather it is the completely appropriate consequence of the application of an age-neutral principle to an accumulating amount of the time value of money"). The Court therefore holds that there has been no violation of ERISA § 204(b)(1)(H) for the reason that the ERISA statute does not protect against allegations of compound interest or the time value of money. In the instant case, under the Pension Plan, the pay credits and interest credits are applied to each employee's hypothetical cash balance account in an age neutral fashion.

ADEA § 4(i) disallows disparate treatment of employees by employers because of age. Plaintiffs' argument is that the implementation of the CB formula resulted in a "wear away" effect of the plan benefit, which resulted in disparate treatment of class members. "Wear away" is a phenomenon unique to cash balance conversions in which a participant does not earn additional benefits until his hypothetical account balance catches up to or "wears away" the frozen accrued benefit under the old plan. Defendants argue that ADEA § 4(i), like ERISA § 204(b)(1)(H), bars discrimination with regard to the inputs to the benefit formula, not the output of the plan.

The Court restates that ERISA does not provide any relief for Plaintiffs on their claim that the CB plan discriminated against older employees. Moreover, because Plaintiffs cannot recover on this claim under the applicable ERISA provisions, it follows that Plaintiffs cannot assert a claim under the mirror ADEA provisions.

The Court finds that ADEA § 4(i) is a "mirror" provision to ERISA § 204(b)(1)(H)(i). ADEA § 4(i) prohibits "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age." 29 U.S.C. § 623(i). "In enacting these amendments, Congress intended that [ADEA § 4(i) and ERISA § 204(b)(1)(H)(i)] be interpreted in a consistent manner to have an identical meaning and to prevent any differences in language to create an inference that a difference exists between them." *Rosenblatt v. United Way of Greater Houston*, 590 F. Supp. 2d 863, 872 (S.D. Tex. Dec. 23, 2008) (citing the 1986 Ominbus Budget Reconciliation Act, Pub. L. No. 99-509, 1986 U.S.C.C.A.N. (100 Stat.) 3868, 4023-24); *see also Hurlic*, 539 F.3d at 1036-37. Moreover, the phrase "rate of an employee's benefit accrual," as is used in ADEA § 4(i), like in ERISA § 204(b)(1)(H), refers to the inputs to the plan, rather than the outputs. Because Plaintiffs cannot recover under ERISA § 204(b)(1)(H)(i), they are likewise not entitled to relief under ADEA § 4(i). *Id.* A contrary interpretation would render ERISA § 204(b)(1)(H)(i) meaningless as Plaintiffs would be able to seek relief under ADEA § 4(i) despite their similarity in construction. *Id.* Accordingly, Plaintiffs have failed to state a disparate treatment claim in violation of ADEA § 4(i).

The Court finds that even if Plaintiffs' ADEA § 4(i) claim is considered separately from their ERISA § 204(b)(1)(H)(i) claim, the structure and terms of the Pension Plan establish that the Pension Plan does not violate ADEA's age discrimination rules. Under the terms of the CB formula, an older employee who was similarly situated to a younger employee in terms of salary and years of service, would always have a higher opening account balance. The older employee would always accrue pay credits at an equal or higher rate than the younger employee, such that the CB formula does not discriminate based on age.

In sum, Plaintiffs have failed to raise a genuine issue of material fact as to their Fourth Claim for Relief under either ERISA § 204(b)(1)(H)(i) or ADEA § 4(i). Such claims fail as a matter of law. The Court therefore enters judgment in the Defendants' favor as a matter of law on Plaintiffs' Fourth Claim for Relief.

(2) Plaintiffs' First Claim for Relief

Defendants' Arguments

Defendants ask the Court to grant summary judgment in their favor on Plaintiffs' First Claim for Relief, which alleges that the Conversion to the CB formula froze retirement benefits and created periods of "wear away" that were age discriminatory in violation of ADEA § 4(a), 29 U.S.C. § 626(a). Defendants describe "wear away" as a phenomenon often associated with conversions to a CB formula where if a plan promises some or all of the participants a benefit equal to the greater of their accrued benefit under the prior plan or the amount they have accumulated in their CB account, and if their opening account balance under the CB formula is set at an amount less than their accrued age 65 annuity benefit under the prior formula, they will accrue no increasing age 65 annuity benefits for a period of time while their accrued benefit under the CB formula "catches up" with their accrued benefit under the prior formula. Defendants assert that despite wear away's effect on the age 65 annuity accrued benefit (the output), the balances in the participants' CB accounts continues to grow each year because of the continuing pay credit and interest credit inputs into the CB accounts.

Defendants point out that courts that have considered age discrimination claims related to wear away, as well as claims that cash balance plans are age discriminatory under ADEA § 4(a), have largely dismissed them as a matter of law in advance of trial.

Defendants argue that ADEA § 4(i) precludes Plaintiffs' claim under § 4(a). They point out that ADEA § 4(i)(4) provides that "[c]ompliance with the requirements of [ADEA § 4(i)] with respect to an employee pension benefit plan shall constitute compliance with the requirements of [ADEA § 4] relating to benefit accrual under such plan." 29 U.S.C. § 623(I)(4). They further contend that courts analyzing this provision have held that allegations involving "wear away" periods due to the conversion to a CB formula must be brought under

§ 4(i), not the generic anti-discrimination provision of ADEA § 4(a), such that compliance with ADEA 4(i) constitutes compliance with all of ADEA § 4. Defendants further contend that if Plaintiffs were allowed to maintain their putative § 4(a) claim, it would render § 4(i) superfluous and entitle Plaintiffs to relief beyond that legally intended.

Defendants point out that Plaintiffs' ADEA § 4(a) allegations fall squarely within ADEA § 4(i) because Plaintiffs allege, "Solvay America set the Initial Account Balances for older, longer-service workers below the value of their early retirement benefits and applied the aforementioned preretirement mortality discount," . . . "[i]t can take years after December 31, 2004 for the cash balance accounts of older, longer-service employees to move ahead of the value of the benefits earned before the changes." (Compl. ¶ 42). Defendants ask the Court to dismiss Plaintiffs' § 4(a) claim because the wear away provision of the Plan relates to benefit accrual, thus the wear away provision need only satisfy the requirements of ADEA § 4(i). Defendants make other persuasive alternative arguments as to why this Court should grant them summary judgment on their ADEA§ 4(a) claim, which the Court finds are not necessary to consider.

Plaintiffs' Arguments

Plaintiffs contend that summary judgement on their First Claim for Relief under ADEA § 4(a) should not be granted. They argue that ADEA § 4(i) does not preclude the application of the prohibition on age discrimination in ADEA § 4(a). As a basis for their argument, Plaintiffs contend that ADEA § 4(i) places early retirement benefits outside of its scope. They assert that by contracts, ADEA § 4(a) prohibits age discrimination in all employee benefits, including early retirement benefits, without limitation. Plaintiffs cite to cases, which they contend lend support to their argument. Plaintiffs also attempt to save their claim by making other arguments, which the Court need not address.

Analysis

ADEA § 4(a) provides the basis for Plaintiffs' disparate impact claim. ADEA § 4 provides:

> (a) It shall be unlawful for an employer –
>
> > (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . .

29 U.S.C. § 623(a)(2). Plaintiffs' First Claim for Relief asserts a violation of the ADEA 4(a) (disparate impact) by stating that the implementation of the Conversion to a CB formula resulted in "wear away", which in turn meant that long-term employees had benefit accruals frozen for several years. (Compl. ¶¶ 38-48).

Plaintiffs' claim for wear away cannot be brought under ADEA § 4(a) because it relates to benefit accrual and is therefore precluded by ADEA § 4(i)(4). ADEA § 4(i)(4) provides that "[c]ompliance with the requirements of [ADEA § 4(i)] with regard to an employee pension benefit plan shall constitute compliance with the requirements of [ADEA § 4] relating to benefit accrual under such plan." 29 U.S.C. § 623(i)(4). Therefore, allegations involving "wear away" periods due to conversion to a CB formula "must be brought under ADEA § 4(i), not the generic anti-discrimination provision of ADEA § 4(a)." *Hurlic*, 539 F.3d at 1037; *see also Northwest Airlines, Inc.*, 594 F. Supp. 2d 1075, 1088 (D. Minn. 2009). Thus, "the wear-away provision need satisfy only the requirements of ADEA § 4(i)." *Hurlic*, 539 F.3d at 1037.

Plaintiffs' ADEA § 4(a) allegations fall squarely within § 4(i). Plaintiffs allege that "because Solvay America set the Initial Account Balances for older, longer-service workers below the value of their early retirement benefits and applied the aforementioned preretirement mortality discount," "[i]t can take years after December 31, 2004 for the cash balance accounts of older, longer-service employees to move ahead of the value of the benefits earned before the changes." (Compl. ¶ 42). This allegation is virtually identical to that rejected in *Hurlic*, where:

> Plaintiffs' wear-away claim protests the fact that under the "greater of" provision, actual benefits payable (as compared to the hypothetical account balance) do not increase until the amount payable under the cash balance formula exceeds that payable under the pre-conversion formula. This claim thus relates to benefit accrual because it challenges the fact that benefits do not increase for some period of time.

539 F.3d at 1037.

The Court adopts the logic employed in *Hurlic* and finds that Plaintiffs' claims for wear away relates to benefit accrual under the plan. Plaintiffs' claim therefore must be brought under ADEA § 4(i), not ADEA § 4(a). However, as previously established, Plaintiffs' claims fail under § 4(i). Therefore, Plaintiffs' First Claim for Relief fails as a matter of law. The Court therefore enters judgment in the Defendants' favor as a matter of law on Plaintiffs' First Claim for Relief.

(3) Plaintiffs' Second Claim for Relief

Defendants' Arguments

Defendants point out that Plaintiffs allege in their Second Claim for Relief that the CB formula's rate of crediting benefits to participants violates the 133 1/3% anti-backloading rules in violation of ERISA § 204(b)(1)(B). ERISA § 204(b)(1)(B) requires that the value of the benefit accrued in any year may not exceed the value of a benefit accrued in any previous year by more than 33%. Defendants contend that Courts addressing similar anti-backloading claims have dismissed them as a matter of law, thus this Court should similarly dismiss such a claim in this case.

Defendants claim that Plaintiffs' theory is that "[w]hen a plan has two or more benefit formulas, e.g., a frozen benefit formula and an on-going benefit formula, 'the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative [accrual] methods.' 26 C.F.R. 1.411(b)-1(a)." (Compl. ¶ 51). Defendants assert that such a theory is flawed because the regulation invoked by Plaintiffs does not apply in cases of plan amendments. Rather, the governing regulation states, "any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years." 26 C.F.R. 1.411(b)-1(b)(2)(ii)(A). Defendants contend that once there is an amendment to the prior plan, only the new plan formula is relevant when ascertaining if the plan satisfies the 133 1/3% test. So, looking at the CB formula, Defendants argue that participants accrue benefits steadily, on a quarterly basis, throughout their career. Defendants argue that had the CB formula been in effect for all of the other Plan years, at no time will the value of the benefit accrued in any year exceed the value of a benefit accrued in any previous year by more than 33%.

Plaintiffs' Arguments

Plaintiffs assert that summary judgment should not be granted to Solvay on Plaintiffs' anti-backloading claim because genuine issues of material fact exist. First, Plaintiffs assert that the pay and interest credits are not actually "payable" at either normal retirement age or early retirement age as ERISA § 204(b)(1)(B) requires. Second, Plaintiffs argue that Solvay and its actuarial expert admit that there were no benefit accruals for many participants in the "age 65 annuity benefit" during the first year after the conversion because of the pre-retirement mortality discount that Solvay applied in establishing opening account balances. Third, Plaintiffs contend that the variable interest crediting rates used by the Defendants can lead to further violations of the anti-backloading rules.

Analysis

Backloading is "a term of art describing a plan's use of a benefit accrual formula that postpones the bulk of an employee's accrual to [the employee's] later years of service." *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323, 333 (S.D.N.Y. 2006). Backloading postpones the time which employers must make contributions to the employee's account, but also provides an incentive for the employee to stay with the company until retirement to reap potentially large retirement benefits. H.R. Rep. No. 93-807 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4670, 4688. Because cash balance plans calculate benefits on the basis of career pay history, the 133 1/3% rule applies to this type of plan. *See* U.S.C. § 1054(b)(1)(B). A cash balance plan satisfies the requirements of the 133 1/3% rule if:

> under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan

year.

29 U.S.C. § 1054(b)(1)(B). In other words, as explained by the Third Circuit, "the value of the benefit accrued in any year may not exceed the value of a benefit accrued in any previous year by more than 33%." *Register*, 477 F.3d at 71.

29 U.S.C. § 1054(b)(1)(B)(i) states that "any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years." Thus, once there is an amendment to the prior plan, only the new plan formula is relevant for a backloading analysis, and "we must assume that, for purposes of applying the 133-1/3 percent rule, there was never a prior plan." *See Hurlic*, 539 F.3d at 1035. Since the amended plan is therefore treated as being in effect for all other plan years, there can be no violation of the anti-backloading provisions through reference to the terms of a prior plan. *See, e.g., Finley v. Dun & Bradstreet Corp.*, 471 F. Supp. 2d 485, 494 (D.N.J. 2007) ("Plaintiff must calculate the entire accrual history as if the [current cash balance plan terms] had been in effect for every year, and thus that the [prior plan terms] had never been in effect."); *Allen v. Honeywell Ret. Earnings Plan*, 382 F. Supp. 2d 1139, 1160 (D. Ariz. 2005) ("[O]ne does not compare the new formula with the old formula; rather, the backloading question must be answered by considering the new formula on a stand-alone basis."); *Wheeler v. Pension Value Plan for Employees of the Boeing Co.*, No. 06-cv-500-DRH, 2007 WL 2608875, at *11-12 (S.D. Ill.

Sept. 6, 2007).

Plaintiffs have failed to establish any basis on which their Second Claim for Relief should survive in light of *Register* and its progeny, including *Hurlic*. The allegations contained within Plaintiffs' Complaint include the assertion that 26 C.F.R. § 1.411(b)-1(a) allows for aggregation of pre-amendment and CB formulas when determining anti-backloading rules. (Compl. ¶ 51). The Court rejects such premise and finds that Plaintiffs' Second Claim for Relief fails as a matter of law. The Court notes that this line of cases has developed since Plaintiffs' filed their Complaint in this matter. Plaintiffs' attempts to skirt the newly developed case law and ignore controlling law requiring that "[a]ny amendment to that plan which is in effect for the current plan year shall be treated as if it were in effect for all other plan years." 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(A). "Thus, once there is an amendment to the prior plan, only the new plan formula is relevant when ascertaining if the plan satisfies the 133 1/3% test." *Register*, 477 F.3d at 72. Under the CB formula in the instant case, participants accrue benefits steadily, on a quarterly basis, throughout their career. (Defs.' Ex. 3, Pension Plan ¶ 12.2(c) & (d)). That participants may experience wear away because of pre-mortality discounts or other discounts in calculating their opening account balances is irrelevant. Plaintiffs also failed to establish why IRS Revenue Ruling 2008-7 is relevant for the Court's consideration of ERISA anti-backloading rules, where this argument has been squarely rejected in other cash balance decisions. *See Hurlic*, 539 F.3d at 134; *Tomlinson*, 27 2007 WL 891378 (D.Colo. Mar., 2007).

Thus, the Court finds that Plaintiffs have failed to raise a genuine issue of material fact regarding the 133 1/3% anti-backloading rule. Therefore, Plaintiffs' Second Claim for Relief fails as a matter of law. The Court therefore enters judgment in the Defendants' favor as a matter of law on Plaintiffs' Second Claim for Relief.

(4) Plaintiffs' Third Claim for Relief

Defendants' Arguments

Defendants dispute Plaintiffs' allegation in their Third Claim for Relief that the CB formula violates ERISA § 203(a), because it does not include, and therefore requires participants to forfeit, early retirement subsidies that were available under the FAP formula. Again, Defendants point to courts which have dismissed such claims as a matter of law in asking the Court to find that Plaintiffs' claim here likewise fails because participants do not forfeit any accrued benefits. Specifically, Defendants assert that the CB plan's provision granting participants the "greater of" the benefits under the previous plan or the CB formula does not inherently violate ERISA's non-forfeiture provisions because with such a "greater of" provision, participants have an unconditional right to claim the maximum benefits under the plan. Defendants assert that participants do not forfeit any accrued benefits because they have a right to the CB credits unless and until those credits surpass their FAP formula minimum benefits. Moreover, Defendants assert that the benefits that have yet to accrue, or benefits which are under the new Plan and early retirement subsidies, cannot be forfeited.

Plaintiffs' Arguments

Plaintiffs contend that lump sum distributions of the cash balance accounts while participants are under wear away cause part of the participants' accrued benefits to be lost or "forfeited" in violation of ERISA § 203(a). Plaintiffs contend that when a participant is entitled to an immediate or a deferred monthly benefit at age 55 or over, Solvay offers a lump sum distribution, even if it has a lesser value than the participants' monthly retirement benefit. Plaintiffs argue that they do not have an unconditional right to claim the maximum benefits available under the plan, as Defendants assert. Plaintiffs also dispute Defendants' contention that participants cannot forfeit any accrued benefits because they do not have a right to the CB credits unless and until those credits surpass their FAP formula frozen benefits. Instead, Plaintiffs argue that Defendants have been inviting participants to exercise their right to take a lump sum distribution of the cash balance credits while they are still in a period of wear away. Defendants also dispute Defendants' assertion that any early retirement subsidies had not yet accrued. Instead, Plaintiffs argue that since 1984, § 204(g)(2) has required that early retirement benefits be treated as part of the accrued benefit that must be protected against loss or forfeiture by plan amendment. Plaintiffs' argue that Defendants have been eliminating or reducing participants' early retirement benefits by removing all mention of them from the Plan document and its disclosures and offering less valuable lump sum distributions of the cash balance accounts in lieu of those benefits.

Analysis

Plaintiffs' Third Claim for Relief alleges that the Defendants has forfeited part of participants' accrued benefits by making lump sum distributions with lesser actuarial value while participants are still under the periods of wear away in violation of ERISA § 203(a). 29 U.S.C. § 1053(a). More concisely, Plaintiffs allege that the CB formula violates ERISA § 203(a) because it does not include, and therefore requires participants to forfeit, early retirement subsidies that were available under the FAP formula.

ERISA § 203(a) requires that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 29 U.S.C. § 1053(a). The Supreme Court held that "the statutory definition of 'non-forfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). "It is the claim to the benefit, rather than the benefit itself that must be 'unconditional' and 'legally enforceable' against the plan." *Id.*

Under the terms of the Pension Plan, qualifying participants are always entitled to the greater of their December 31, 2004 FAP benefits or their CB benefits. Because the terms of the Pension Plan state that participants' "[a]ccrued [b]enefit shall not be less than the [a]ccrued [b]enefit defined in Section 1.1 as of December 31, 2004 . . ." participants never forfeit any benefits that were accrued under the terms of the pre-Conversion Pension Plan. (Defs.' Ex. 3, Pension Plan ¶ 12.2). The Court finds that the terms of the Amended Pension Plan do not grant participants a claim to the CB formula benefits during any time in which those benefits are less than the participant's December 31, 2004 FAP benefits. *Id.* Therefore, participants do not forfeit any CB benefits while those benefits are less than the participant's minimum FAP benefits. "Section 203(a) gives [participants] a non-forfeitable claim to [their] accrued benefit, but the balance of the hypothetical cash account does not become part of [their] accrued benefit until it surpasses the value of the frozen Traditional Plan benefit. Thus, the plan does not require a forfeiture of an accrued benefit, nor is the receipt of accrued benefits conditional." *Richards v. Fleetboston Fin. Corp.*, 427 F. Supp. 2d 150, 170; *see also Tomlinson,* 2007 WL 891378 (rejecting plaintiffs' forfeiture claim that "the right to receipt of cash balance accruals is conditioned on foregoing receipt of previously-earned benefits in annuity form”).

Plaintiffs fail to establish how the Pension Plan’s offer of benefits in the form of a lump sum changes the analysis. Participants are always entitled to at least the annuity benefit equal to their December 31, 2004 FAP benefits because of the Pension Plan’s “greater of” provision. (Defs.’ Ex. 3, Pension Plan ¶ 12.2). The additional choice of taking a lump sum actuarial equivalent does not force participants to forfeit their protected benefits. Likewise, the Pension Plan’s greater of provision prevents a forfeiture even though the participants’ opening account balances do not include early retirement subsidies. (Compl. ¶¶ 54-55).

Moreover, because any early retirement subsidies under the FAP formula had not yet accrued, they, therefore, could not be forfeited. “Benefits already earned under an old plan may not be taken away, but benefits expected but not yet accrued are not similarly protected.” *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 8 (1st Cir. 2003); *see also Sunder v. U.S. Bank Pension Plan,* 2007 WL 541595, at *12-13 (E.D. Mo. Feb. 16, 2007) (finding that early retirement subsidies are only expected future benefits and have not yet accrued).

Thus, the Court finds as a matter of law that the Plaintiffs’ forfeiture claim fails. The Court therefore enters judgment in the Defendants’ favor on Plaintiffs’ Third Claim for Relief.

(5) Plaintiffs’ Fifth Claim for Relief

In addition to Defendants' Motion for Summary Judgment, Plaintiffs also submitted their Motion for Partial Summary Judgment on Claim V. In Plaintiffs' Partial Motion for Summary Judgment on Claim V, Plaintiffs ask the Court to grant summary judgment in their favor on the issue of whether Defendants violated ERISA § 204(h) and Treasury Regulation 54.4980F-1. In their Motion for Summary Judgment, Defendants ask the Court to rule in their favor on the same issue. The Court will address both motions jointly below.

Defendants' Arguments

Defendants contend that Plaintiffs' 204(h) Notice claim, that Defendants failed to disclose required information to participants, fails as a matter of law. Defendants ask the Court to examine the "four corners" of the 204(h) Notice document and find that it is written in a manner calculated to be understood by the average plan participant and it includes all the information ERISA requires.

Defendants contend that ERISA requires and the Notice contains: (1) a description of the benefit formula before the amendment and under the plan as amended; (2) a description of how any early retirement subsidies are calculated from the accrued benefit before and after the amendment; (3) the effective date of the amendment; (4) sufficient information so participants can determine the approximate magnitude of the expected reduction in their benefit, which is satisfied with the inclusion of at least one illustrative example showing the approximate magnitude of the reductions; and (5) the assumptions used in the illustrative examples. 26 C.F.R. § 54.4980F-1, Q&A (11). Defendants also assert that the Notice was provided to participants in writing on September 2004, which is more than the mandated 45 days in advance of the Conversion.

Defendants dispute Plaintiffs' attempts to impose additional requirements not required by ERISA. First, Defendants argue that the Notice adequately disclosed wear away. Specifically, Defendants assert that although the Notice does not specifically include the technical term "wear away," which is not required, the Notice included a narrative explaining the potential for wear away in layman's terms and an explanatory chart, which satisfies the requirements of 26 C.F.R. § 54.4980F-1. Defendants further contend that there is no requirement that individualized reductions or examples of wear away be included in the Notice. They contend that Tables A and B of the Notice provided sixteen different illustrations, with side-by-side comparisons under the old and new plan for retirement at both age 55 and 65, which sufficiently provide the approximate magnitude of the expected reductions in Pension Plan benefits. Defendants assert that these examples clearly disclose that participants' monthly benefit under the new formula was almost always smaller then that under the old formula.

Defendants also contend that in addition to Tables A & B, the second page of the

Notice includes summary descriptions of the benefit formula, including early retirement benefit subsidies, under the old and new plans. They add that the third page of the Notice further describes and calculates early retirement benefits with a detailed disclosure of wear away in the example and states that participants may notice that "their monthly benefit may not increase at the same rate or at all in some years" and that participants may experience "flat or small monthly benefit increases." (Defs.' Ex. 7, 204(h) Notice). Additionally, Defendants assert that requiring the Notice to comply with the additional requirements that Plaintiffs request would compel disclosure of technical jargon, unworkable calculations, and a seemingly endless number of individualized examples.

Next, Defendants assert that, assuming the Court finds that the Notice failed to include the required information, Plaintiffs cannot establish extraordinary circumstances or an egregious failure to obtain substantive relief. Furthermore, Defendants contend that they worked with Towers and Pillsbury to ensure that sufficient information was included in the Notice and that there had been no evidence presented that they acted in bad faith.

Plaintiffs' Arguments

Plaintiffs ask the Court to grant partial summary judgment in their favor and to find as a matter of law that the Notice was inadequate. They argue that because the potential wear away was not disclosed to participants in language which was calculated to be understood by the average plan participant, the Notice was insufficient under 204(h) and the associated Treasury Department Regulations. Plaintiffs also assert that Defendants did not disclose the early retirement reduction factors, the general classes of employees subject to wear aways or the approximate range of wear aways, or the reductions in future accruals which have left older employees with almost no future benefits.

First, Plaintiffs assert that the Notice which describes a significant reduction in future benefits must provide sufficient information to employees to enable them to understand the effects of the plan amendment, including the approximate magnitude of reduction in their future benefits. Plaintiffs agree with Defendants that no individualized explanation is required.

Plaintiffs argue that Defendants failed to disclose reductions resulting from the Conversion in accordance with ERISA § 204(h) and Treasury Regulation 54.4980F-1. Defendants argue that the notice does not describe how early retirement benefits are calculated before and after the cash balance amendment. Plaintiffs assert that the term "subsidy" is not defined in the Notice, nor is there disclosure of the percentage reductions that apply to early retirements under the cash balance formula. Moreover, Plaintiffs argue that the Notice is deficient because it does not disclose that Employees in their 40's of 50's who were not grand-fathered can experience up to ten or more years of wear away. They argue that the individual notices do not inform participants whether they will be subject to wear aways.

Plaintiffs further object to the Notice because they assert that it does not describe the severe reductions in future retirement benefit accruals in the manner prescribed by the regulations. They argue that these reductions are not described in numerical or percentage terms as required by the regulations. They contend that the numerical information provided in Tables A and B does not conform because it does not provide the approximate magnitude of reductions in terms of future benefits.

Next, Plaintiffs contend that Defendants' violations of 204(h) are egregious because participants did not receive most of the information about the reductions and Defendants did not promptly rectify the violations. Plaintiffs assert that the decision to withhold information was deliberate and that it significantly affected every participant.

Analysis

In their Fifth Claim for Relief, Plaintiffs allege that Defendants violated ERISA § 204(h) and failed to disclose statutorily-required information in the Notice to Pension Plan participants. Specifically, Plaintiffs allege that the 204(h) Notice did not properly disclose (1) the reductions in future retirement benefit accruals; (2) how early retirement benefits are calculated before and after the Conversion; and (3) periods of wear away . The Court finds that the 204(h) Notice sufficiently disclosed all legally-required information and thus grants summary judgment in favor of Defendants and against Plaintiffs on Claim V.

Where applicable, ERISA § 204(h) requires the plan administrator to provide participants with a notice that "shall be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with regulations prescribed by the Secretary of the Treasury) to allow applicable individuals to understand the effect of the plan amendment." 29 U.S.C. § 1054(h)(2).

Regulation 26 C.F.R. 54.4980F-1 lists the information a 204(h) notice must contain: (1) a description of the benefit formula before the amendment and under the plan as amended; (2) a description of how any early retirement subsidies are calculated from the accrued benefit before and after the amendment; (3) the effective date of the amendment; (4) sufficient information so that participants can determine the approximate magnitude of the expected reduction in their benefit, which is satisfied with the inclusion of at least one illustrative example showing the approximate magnitude and range of reductions; and (5) the assumptions used in the illustrative examples. 26 C.F.R. § 54.4980F-1 Q&A-11. This information must be written in a manner calculated to be understood by the average plan participant and be provided at least 45 days before the amendment. 26 C.F.R. § 54.4980F-1 Q&A 11(a)(2).

Disclosure of the Reductions in Future Retirement Benefit Accruals

Regulation 26 C.F.R. 54.4980F-1 Q&A-11(a)(4)(i)(A) requires that a 204(h) notice "include sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction [of benefits] for that individual." The requirements of Q&A-11(a)(4) are "deemed satisfied if the notice includes one or more illustrative examples showing the approximate magnitude of the reduction in the examples." 26 C.F.R. § 54.4980F-1 Q&A-11(a)(4)(ii)(A). In amendments similar to that at issue, the illustrative examples "must show the approximate range of reductions." 26 C.F.R. § 54.4980F-1 Q&A-11(a)(4)(ii)(B).

The Notice satisfies the requirements of Q&A-11(a)(4) through the illustrative examples contained in Tables A and B. Tables A and B each provide eight different examples of participants at various ages and years of service that illustrate and compare the amount of Pension Plan retirement benefits under the FAP formula and the CB formula if the participant left employment at age 55 or 65. (Defs.' Ex. 7, 204(h) Notice). Tables A and B provide sample side-by-side comparisons that were calculated to show the magnitude of the reduction in Pension Plan benefits. Further, Tables A and B illustrate the approximate range of reductions with their use of sample employees ranging from age 30 with 5 years of service to age 60 with 20 years of service, as well as the use of two representative annual pay rates of $45,000 and $90,000.

Although Plaintiffs argue that the Notice does not disclose the approximate magnitude of the reductions in narrative form, information similar to that of Example 4 to Q&A-11(b), and the reductions in terms of a percentage of participants' highest average pay, neither ERISA § 204(h), nor 26 C.F.R. § 54.4980F-1 require the disclosure of this information through a 204(h) Notice.

The Court finds that the Notice provided "sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction [of benefits] for that individual" through the illustrative examples contained in Tables A and B. The Court therefore finds that Plaintiffs fail to establish that the Notice violates ERISA or the regulations; therefore, the Court denies Plaintiffs' Motion for Partial Summary Judgment on Claim V as to this allegation.

Description of Early Retirement Subsidies

Under 26 C.F.R. § 54.4980F-1 Q&A(a)(3)(ii) "the notice must describe how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit after the amendment." 26 C.F.R. § 54.4980F-1 Q&A-11(a)(3)(ii). The Notice discloses how the Pension Plan's early retirement subsidies were calculated before and after the Conversion in its sections entitled "Summary of Plan Formula Changes" and "Early Retirement Benefits."

(Defs.' Ex. 7, 204(h)Notice). The Notice was also provided in writing on or about September 2004, i.e. 45 days in advance of the Conversion, and provided that the Pension Plan amendment will be "[e]ffective January 1, 2005."

The 204(h) Notice section entitled "Summary of Plan Formula Changes" includes a description of the FAP formula, including early retirement and early retirement subsidies. It states:

> Under the current plan, you earn a life annuity commencing at age 65 equal to a percentage of average earnings prior to retirement for each year of service (1.1% of average earnings plus 0.6% of average earnings in excess of Social Security covered compensation). Generally, this benefit cannot be taken as a lump sum. The current plan also allows you to retire as early as age 55 and receive a life annuity commencing on your early retirement date but reduced to reflect the earlier commencement. The current plan formula includes an early retirement subsidy.

(Defs.' Ex. 7, 204(h) Notice) (emphasis added). This "description" provided that under the FAP formula, participants could retire early at age 55 subject to reductions to reflect the earlier retirement, and notes that there is an early retirement subsidy. In addition, the 204(h) Notice section entitled "Early Retirement Benefits" includes an illustrative example that calculates reductions under the FAP formula for an individual who is "age 54 as of December 31, 2004 with 12 years of service and earnings of $50,000." (Defs.' Ex. 7, 204(h) Notice). When one refers to the table, one sees that the table calculates the monthly accrued benefit under the FAP formula for every year from age 55 through age 65, demonstrating the early retirement reductions. As evident, the first two columns of this table calculate that from the $500 age-65 monthly benefit, an earlier retirement at age 64 would provide for a reduced benefit of $485 (which is 3% less than the $500 age 65 benefit). (Defs.' Ex. 7, 204(h) Notice). Each subsequent year provided in the illustration has a corresponding reduction. (Defs.' Ex. 7, 204(h) Notice).

The 204(h) Notice also adequately describes the CB formula and how the early retirement benefit is calculated after the amendment by noting the lack of early retirement subsidies.

Specifically, the 204(h) Notice states:

> Under the new [CB] Plan, your benefit is described in terms of an account balance, which you will be able to receive either as a lump sum or a life annuity. Your account grows each year with interest as well as pay credits. Interest credits vary each year depending on the prevailing yields on 30-year Treasury Bonds. The pay credits vary depending on your age and service as follows.
>
> . . .
>
> The benefit you have earned or accrued as of December 31, 2004 under the current plan will be converted to your starting account balance under the new plan by taking the actuarial present value of your accrued benefit based on a 5% discount rate. Early retirement factors are not considered in this calculation. The present value calculation assumes that you do not retire until age 65. Therefore, the starting account balance does not include the value of the early retirement subsidy.
>
> You can always elect to receive your account balance in the form of a life

> annuity under the new plan. Your life annuity at any retirement age will never be less than the retirement benefit you will have earned under the current plan as of December 31, 2004, which will include an early retirement subsidy, if applicable. In addition, the same optional forms of payment available under the current plan will be available under the new [CB] Plan. The benefit you earn after December 31, 2004 under the new [CB] Plan formula will not include early retirement subsidies.

(Defs.' Ex. 7, 204(h) Notice). The 204(h) Notice provides that the opening account balance does not include the value of the early retirement subsidy, and further goes on to make an explicit statement that the CB formula "will not include early retirement subsidies." (Defs.' Ex. 7, 204(h) Notice).

The Court finds that the 204(h) Notice provided an adequate description of how the Pension Plan's early retirement subsidies were calculated both before and after the Conversion. The Court therefore finds that Plaintiffs fail to establish that the 204(h) Notice violates ERISA or the regulations. The Court thus denies Plaintiffs' Motion for Partial Summary Judgment on Claim V as to this allegation.

Disclosure of Wear Away

While 26 C.F.R. § 54.4980F-1 mentions the term "wear away" in its listings of requirements for other disclosures, there is no specific disclosure requirement for "wear-away." The 204(h) Notice, however, sufficiently disclosed the potential for wear away, provided an illustrative example, and described how wear away is generated in narrative form.

(Defs.' Ex. 7, 204(h) Notice). In this way, the 204(h) Notice satisfied any possible requirements for wear away.

Although the 204(h) Notice does not specifically include the technical term "wear away," which is not required to be included, the Notice explains the potential for wear away in layman's terms and states multiple times that benefits may appear to not increase under the CB formula. (Defs.' Ex. 7, 204(h) Notice). The 204(h) Notice states that a participant may notice that "their monthly benefit may not increase at the same rate or at all in some years" and that participants may experience "flat or small monthly benefit increases." (Defs.' Ex. 7, 204(h) Notice).

The 204(h) Notice also provides an illustrative example demonstrating the effect of wear away. The Notice states that the example "compares the monthly annuity earned under the current [FAP] plan at December 31, 2004 . . . to the monthly annuity and lump sum benefit under the new [CB] plan that would be payable at each retirement age from 55 to 65," and provides chart to show such effect.

In addition, the narrative following the illustrative example states that "the actuarial equivalent monthly annuity will be no greater than the monthly annuity earned as of December 31, 2004 until this employee reaches age 61, when she will begin to earn an additional benefit under the new plan formula." (Defs.' Ex. 7, 204(h) Notice). The 204(h)

Notice highlights that in the example, "the new pension formula does not show an increase in the annuity values between ages 55 and 60 . . . ." (Defs.' Ex. 7, 204(h) Notice). In each of these ways, and in combination, these facets of the 204(h) Notice met any wear-away disclosure requirements of ERISA and 26 C.F.R. § 54.4980F-1 Q&A-11.

The Court finds that the 204(h) Notice provided an adequate description of wear away. The Court therefore finds that Plaintiffs fail to establish that the 204(h) Notice violates ERISA or the regulations. Because the Court finds against Plaintiffs and in favor of Defendants in that there was no violation of ERISA § 204(h) and the accompanying regulations as a matter of law, it need not discuss whether the alleged violation was egregious or intentional. The Court thus denies Plaintiffs' Motion for Partial Summary Judgment on Claim V and grants Defendants' Motion for Summary Judgment as to this allegation.

Therefore, the Court finds that Defendants are entitled to judgment as a matter of law in their favor on the Plaintiffs' Fifth Claim for Relief.

(6) Plaintiffs' Sixth Claim for Relief

Defendants' Arguments

Defendants assert that in their Sixth Claim for Relief, Plaintiffs attempt to re-write ERISA, blur the requirements between a summary plan description ("SPD")and a summary of material modification ("SMM"), and impose obligations not required under ERISA. Defendants also assert that it is unclear as to whether Plaintiffs also attempt to allege a breach of fiduciary duty claim as a means to impose disclosures that the Defendants assert are not required under ERISA's SMM provisions. Defendants ask the Court to dismiss Plaintiffs' Sixth Claim as other courts have as a matter of law when considering similar claims.

First, Defendants assert that the SMM fulfills ERISA's requirements.[1] Defendants assert that such SMM satisfied ERISA § 102(a)'s requirement because it disclosed the Conversion to the CB formula and described the changes to the Pension Plan. Defendants dispute Plaintiffs' claims that the SMM is deficient because it did not make full disclosures about the CB plan and failed to offer participants tools for calculating their future retirement benefits, thereby preventing them from engaging in financial planning. Defendants argue that ERISA § 102 does not require them to provide such information in the SMM. Specifically, Defendants dispute the following allegations made by Plaintiffs: (1) that the SMM is deficient because it does not disclose that the class members' opening account balances are discounted for pre-retirement mortality; (2) that the SMM is deficient because it did not compare the rates of benefit accruals between the old and new formulas; and (3) that the CB formula reduced the rate of the participants' "benefit accrual" because of age.

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[1] It was Defendants' intention that the 204(h) Notice and Future Choice brochure served together as the required SMM.

Second, Defendants ask the Court to find that Plaintiffs' SMM claim does not entitle them to substantive relief because in the absence of reliance or prejudice flowing from a faulty plan description, Plaintiffs are not entitled to any substantive relief. Defendants argue that Plaintiffs presented no evidence that participants relied on or were otherwise prejudiced by any alleged lack of information required to be in the SMM. Defendants further assert that they were legally entitled to change the terms of the Pension Plan and convert it to a CB formula. Defendants also argue that Plaintiffs cannot prove bad faith or active concealment. They ask the Court to dismiss Plaintiff's SMM claim because without extraordinary circumstances of bad faith, active concealment, or fraud, defects in fulfilling the reporting and disclosure requirements of ERISA do not give rise to a substantive remedy other than that provided in ERISA § 502(a)(1)(A) (the section assessing fines for nondisclosure of documents).

Third, Defendants argue that Plaintiffs' unclear breach of fiduciary duty allegation is untenable. Defendants argue that the language of Paragraph 75 of Plaintiffs' Complaint, "Solvay America's failure to understandably disclose the disadvantages of the cash balance amendments also violates the fiduciary duty under ERISA § 404(a)(1) . . ." is unclear as to whether this is a separate claim. Nonetheless, Defendants ask the Court to dismiss such a claim because it is nothing more than a restatement of Plaintiffs' 204(h) Notice and SMM claims. Defendants contend that without any new allegations, Plaintiffs assert, without evidence, that Solvay America violated a fiduciary duty under ERISA § 404(a)(1) for failing to provide participants with the information needed to make well informed employment, savings, and retirement decisions. Defendants again assert that the 204(h) Notice and SMM were accurate and disclosed all required information. Defendants also assert that Plaintiffs may not use a claim of breach of fiduciary duty to impose disclosure that ERISA's disclosure provisions do not require.

Moreover, Defendants assert that a breach of fiduciary duty claim would also fail because Plaintiffs cannot establish that they relied on a misrepresentation or an omission from the SMM to their detriment. Defendants contend that Plaintiffs' Complaint is void of any facts or allegations that the SMM failed to disclose information and Plaintiffs cannot establish that participants cannot establish that participants did not receive the information from other sources.

Plaintiffs' Arguments

Plaintiffs first assert that Defendants' SMM inadequately disclosed the wear away that participants were facing, the changes in early retirement reductions, and the potential forfeitures in lump sum distributions. Plaintiffs argue that because Defendants did not disclose the circumstances that may result in denial or loss of benefits, the SMM is deficient. Plaintiffs contend that the SMM in this case is also deficient because when changes are made to an employee benefit plan, an SMM must understandably disclose the full import of the changes, which was not done in this case, in light of wear away periods.

Plaintiffs assert that Defendants SMM never adequately disclosed the general classes of employees subject to wear away or the approximate range of such wear aways. They also assert that Defendants have never understandably disclosed the changes in reduction factors for early retirement. Plaintiffs assert that these failures led participant to accept lump sum distributions even when the value of their monthly benefits is higher.

Second, Plaintiffs argue that Defendants breached their fiduciary duties by refusing to provide comparative information in response to questions from employees. Plaintiffs contend that such questions included inquiries into how the old plan's benefits compared with the new plan and how opening account balances were determined. Plaintiffs assert that these questions show that Defendants' 204(h) Notice had not communicated sufficient information for employees to understand the comparison between the new and old plan benefits and make informed decisions about the terms of their employment with Solvay and their savings for retirement based on the reductions that the Defendants were about to carry out. Plaintiffs contend that Defendants did not provide responsive information to their employees.

Lastly, Plaintiffs assert that they will show prejudice from inadequate disclosures.

Analysis

Plaintiffs Sixth Claim for Relief alleges that Defendants' SMM was inadequate under ERISA § 102, while mandates that Defendants provide Plaintiffs with a satisfactory SMM. ERISA § 102(a) provides that "[a] summary of any material modification in the terms of the plan . . . shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 U.S.C. § 1024(b)(1)]." 29 U.S.C. § 1022(a). Here, Solvay's 204(h) Notice and the Future Choice brochure in combination served as the SMM. (Defs.' Ex 7, 204(h) Notice). The Court finds that the SMM satisfied ERISA's requirements because it disclosed the conversion to the CB formula and described the changes to the Pension Plan. (Defs.' Ex. 7, 204(h) Notice; Ex. 13, Future Choice Brochure). The SMM was written in a manner calculated to be understood by the average plan participant. Defendants worked with their experts at Towers and Pillsbury throughout the Conversion process to ensure the SMM was adequate.

The Court agrees with Defendants in their assertion that although ERISA § 102(a) does not expressly require it to do so, the SMM: (a) stated that the "[a]ctuarial equivalence used . . . to calculate the opening balance is based on the most recent IRS-mandated mortality table"; (b) stated that some participants' monthly benefits may not increase at the same rate or at all in some years" and provided an example demonstrating this; (c) disclosed how initial account balances were calculated and that the opening account balances accounted for "pre-retirement mortality"; and (d) included multiple tables illustrating the benefits under the FAP and CB formulas.

Plaintiffs' attempt to "bootstrap" requirements found in ERISA regulations applicable to the Summary Plan Descriptions ("SPDs") on to the requirements for a SMM. Plaintiffs Complaint does not allege that Defendants failed to provide a proper SPD to participants and beneficiaries. Had Defendants failed to provide a proper SPD, the regulations allow for imposition of specific fines in appropriate circumstances, but not for a private right of action. 29 U.S.C. § 1024.

Plaintiffs have adduced no competent evidence that the SMM did not comply with the requirements of ERISA. Instead, Plaintiffs argue that the "regulations on making SMMs understandable to the average participant are identical to those applicable summary plan descriptions." (Response at 35). The SPD regulations to which Plaintiffs cite, 29 C.F.R. § 2520.102-2, are entitled "Style and format of summary plan description" and include no mention of SMMs. Moreover, the cases cited by Plaintiffs in support of this argument relate only to the SPD requirements, and not SMMs. Likewise, Plaintiffs have no basis on which to argue that wear away must be disclosed in the SMM, as ERISA § 102 does not require such a disclosure in the SMM. Here again, Plaintiffs' citations to authorities addressing SPD language are misplaced.

Secondly, the Court finds Plaintiffs' fiduciary duty allegation are also contrary to law. Such arguments are unavailable to Plaintiffs, as Plaintiffs may not use a claim of breach of fiduciary duty to create disclosure obligations that do not otherwise exist under ERISA. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405-06 (6th Cir. 1998) ("It would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed."); *Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552, 555-56 (5th Cir. 2000) (rejecting claim that ERISA § 404 may require disclosure of information not expressly required and not required in other specific ERISA disclosure provisions). The Court finds that ERISA provides a specific procedure for participants to request certain plan documents and penalties for failing to reply to such requests. *See* ERISA § 502(c), 29 U.S.C. § 1132(c). Plaintiffs have presented no evidence that participants followed the procedures to request particular documents or that Defendants failed to comply with disclosure requirements under ERISA § 502(c). Again the cases cited by Plaintiffs, such as *Vanity Corp. v. Howe*, 516 U.S. 489, 504 (1996), do not support their proposition that SMMs must include information other than what is required under the specific disclosure requirements of ERISA.

Therefore, the Court finds that Plaintiffs have failed to raise a genuine issue of material facts as to their Sixth Claim of Relief; therefore, Defendants are entitled to judgment as a matter of law in their favor on the Sixth Claim for Relief.

(7) Plaintiffs Are Not Entitled to Liquidated Damages

Defendants ask the Court to find that Plaintiffs are not entitled to double damages under the ADEA because: (1) Plaintiffs cannot prove that Defendants committed a "willful violation" of the ADEA; and (2) Plaintiffs do not seek "amounts owing."

First, Defendants contend that Plaintiffs cannot prove that Defendants committed a willful violation, so Plaintiffs should be precluded from recovering liquidated damages because under the ADEA liquidated damages are only payable in cases of willful violations. Defendants argue that Plaintiffs cannot establish a genuine issue of material fact that the employer knew or showed reckless disregard as to whether the conduct violated the ADEA. Defendants also assert that no willful violation can be found where the Defendants relied in good faith on the advice of counsel, such as Towers and Pillsbury.

Second, Defendants argue that Plaintiffs cannot establish any "amounts owing;" therefore, liquidated damages are not available. Defendants contend that throughout the course of this litigation, Plaintiffs have represented to the Court that they are not asserting claims for benefits or any "amounts owing" (such as lost pension rights) but instead are seeking equitable relief for the alleged statutory violations of ERISA. Such equitable relief is not subject to doubling as liquidated damages.

Plaintiffs' Arguments

Plaintiffs dispute Defendants allegations.

Analysis

Because the Court has entered judgement as a matter of law in favor of Defendants on all of Plaintiffs' claims, it finds that Plaintiffs are not entitled to any relief, liquidated damages, or otherwise.

For the foregoing reasons it is hereby,

ORDERED that Defendants' Motion for Summary Judgment, at Docket Number 109, is and shall be, **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment, at Docket Number 106, is and shall be, **DENIED.**

IT IS FURTHER ORDERED that all of Plaintiffs' Claims for Relief against Defendants shall be, and are, **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that all outstanding motions in this matter will be rendered **DENIED AS MOOT.**

IT IS FINALLY ORDERED that this Court enters judgment as a matter of law in Defendants' favor on all claims contained in Plaintiffs' Class Action Complaint.

Dated this 3rd day of August, 2009.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE